IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 244 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME TAX

Versus

N A DAVE,

Appearance:

MR AKIL QURESHI FOR MR MANISH R BHATT for Applicant.

MR NR DIVETIA for Respondent.

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE D.A.MEHTA

Date of decision: 19/09/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

In this reference at the instance of the revenue, the following question has been referred for the opinion of this Court in respect of the assessment year 1985-86 :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee was entitiled to investment allowance on X-ray machine installed by him ?"

2 We have heard Mr.N.R.Divetia, learned Counsel for the assessee and Mr.Akil Qureshi, learned Counsel for the revenue.

3 The assessee, a consulting radiologist, is running an X-ray clinic. He claimed investment allowance u/s. 32-A of the I.T.Act on machinery purchased for medical profession. The Assessing Officer disallowed the said claim of investment allowance holding that the machinery used by the assessee for his medical profession could not be said to be used in a new "Industrial Undertaking" within the meaning of section 32A of the I.T.Act.

4 On appeal, the Dy. CIT (Appeals), following the decision of CIT(A) Baroda in assessee's case for A.Y.1987-88, in which, it was held that the assessee was entitled to investment allowance u/s.32A of the I.T.Act on the cost of the new X-ray and other machinery installed during the year, allowed the assessee's appeal.

5 However, in the appeal filed by the revenue, the Tribunal followed its decision in assessee's own case for the assessment year 1987-88 and upheld the order of the Dy.C.I.T.(Appeals). Hence, this reference has been made at the instance of the revenue.

6 In the assessee's own case for the assessment year 1980-81, the Tribunal had considered the same question and held in favour of the revenue. Hence, at the instance of this very assessee a reference was made to this Court which came to be considered in case of Natvarlal Ambalal Dave vs. C.I.T.(1997) 225 I.T.R.936. In the said decision this Court declined to answer the question and remanded the matter to the Tribunal to consider the question whether looking to the volume, extent and nature of the activity the assessee could be said to be carrying on business activity contemplated by

Sec.32A of the Act. This Court held that if the activity is really commercial or in any event if the vocation of the assessee is an admixture of both, then the assessee would be entitled to relief for development rebate as held by Madras High Court in V.K.Ramachandran's case [1981] 128 ITR 727.

7 In the order giving rise to the present reference also, the Tribunal has not considered the aforesaid aspect. Therefore, we decline to answer the question leaving it for the Tribunal to decide, when it disposes of the appeal under section 260 of the Act keeping in mind the observation made by this Court in this very assessee's case in the aforesaid reported judgment in 225 ITR 936.

8 In view of the above, we decline to answer the question. The reference is accordingly disposed of with no order as to costs.

Sd/- Sd/-
(M.S.Shah, J) (D.A.Mehta, J)

m.m.bhatt